No. 95-1360

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CLINTON WEBB AND NATIONSBANK OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS, DECEASED, PETITIONERS,

V.

THE UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Charles F. Witthoefft, Counsel of Record
Everette G. Allen, Jr.
John C. Ivins, Jr.
HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, P.C.
The Federal Reserve Bank Building
701 East Byrd Street
Post Office Box 500
Richmond, Virginia 23218-0500
(804) 771-9500

Attorneys for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED FOR REVIEW

Whether the doctrine of equitable tolling, presumed to apply to claims against the government as expressed in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is applicable to toll the limitations period for tax refund claims under 26 U.S.C. §§ 6511 (a) and (b).

TABLE OF CONTENTS

Page

Opinions Delivered Below 2
Statement of Jurisdiction 2
Relevant Statutory Provisions 2
Statement of the Case 4
Reasons for Granting the Petition 13

I. Decisions of the Circuits, Most Recently Those of the Fourth and Ninth Circuits, are in Conflict as to the Applicability of the Doctrine of Equitable Tolling to Tax Refund Actions 13

A. The First Circuit 16
B. The Eleventh Circuit 18
C. The Fourth Circuit 20
D. The Ninth Circuit 23

II. The Issues Presented by this Appeal are of Exceptional Importance and Should be Addressed by this Court 26

Conclusion 28
Appendix A 1a
Appendix B 27a
Appendix C 39a

TABLE OF AUTHORITIES

Cases:

Ammer v. United States, 881 F. Supp. 1007 (D. Md. 1994), *aff'd*, 56 F.3d 60 (4th Cir. 1995) . 22

Amzen v. Internal Revenue Service, 91-1 U.S.T.C. ¶ 50,020 (W.D. Wash. 1990) 25

Brennan v. United States, 94-1 U.S.T.C. ¶ 50,247 (C.D. Cal. 1994) 14

Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) 22

Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564 (Fed. Cir. 1993), *cert. denied*, 113 S.Ct. 2995 (1993) 22

Commissioner v. Lundy, ___ U.S. ___, 64 U.S.L.W. 4061 (U.S. Jan. 17, 1996)(No. 94-1785) 17

Fadem v. United States, 52 F.3d 202 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3469 (Dec. 26, 1995) 22

Farris v. United States, 877 F. Supp. 1549 (M.D. Fla. 1994) 22

First Alabama Bank, N.A. v. United States, 981 F.2d 1226 (11th Cir. 1993) 15, 20, 24

First Interstate Bank of Nevada v. United States,
874 F. Supp. 286 (D. Nev. 1994) 14, 22, 24

First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*,
493 U.S. 1070 (1990) 11

George F. Miller Farms, Ltd. v. United States,
27 Fed. Cl. 672 (1993) 22

Golbach v. Sullivan,
779 F. Supp. 9 (N.D.N.Y. 1991) 22

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) . . . . . *passim*

Johnsen v. United States,
758 F. Supp. 834 (E.D.N.Y. 1991) 15, 22

Justice v. United States,
6 F.3d 1474 (11th Cir. 1993) 22

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 16

Medellin v. Shalala, 23 F.3d 199 (8th Cir. 1994) . . 22

Miller v. United States,
38 F.3d 473 (9th Cir. 1994) 25

Musser v. United States,
92-1 U.S.T.C. ¶ 50,245 (D. Alaska 1991) 25

Nunnally v. MacCausland, 996 F.2d 1 (1st Cir. 1993) 22

Oropallo v. United States, 994 F.2d 25
(1st Cir. 1993), *cert. denied*, ___ U.S. ___,
114 S.Ct. 705 (1994) 10, 16-18, 22, 24

Raspberry v. Secretary of Health & Human Services,
32 Fed. Cl. 777, *rev'd on other grounds*,
33 Fed. Cl. 420 (1995) 22

Razaino v. United States,
999 F.2d 1539 (11th Cir. 1993) 22

Rosser v. United States,
9 F.3d 1519 (11th Cir. 1993) 15, 20

Supermail Cargo Inc. v. United States,
68 F.3d 1204 (9th Cir. 1995) 22

Szpunar-Lojasiewicz v. Internal Revenue Service,
876 F. Supp. 465 (W.D.N.Y. 1994) 14, 22

United States v. Brockamp, 67 F.3d 260
(9th Cir. 1995), *petition for cert. filed*,
No. 95-1225 (Jan. 31, 1996) 12, 14, 15, 23-26

United States v. Dalm,
494 U.S. 596 (1990) 8, 19-20, 23

United States v. Scott, Nos. 94-15321, 15323
(9th Cir. Oct. 5, 1995), *petition for cert. filed*,
No. 95-1225 (Jan. 31, 1996) 12, 14, 15, 25-28

Vintilla v. United States,
931 F.2d 1444 (11th Cir. 1991) 15, 18-21, 24

Webb v. United States,
66 F.3d 691 (4th Cir. 1995) . . . 2, 8-12, 20-23, 24, 27

Webb v. United States,
850 F. Supp. 489 (E.D. Va. 1995) 2, 8

Wiltgen v. United States,
813 F. Supp. 1387 (N.D. Iowa 1992) 15, 22

Statutes:

26 U.S.C. § 6511 . . . . . *passim*

26 U.S.C. § 7422(a) 4

28 U.S.C. § 1254(1) 2

Securities Exchange Act of 1934, § 9(e) 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

CLINTON WEBB AND NATIONSBANK OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS,DECEASED, PETITIONERS,

V.

THE UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12 of this Court, Clinton Webb and NationsBank, N.A., f/k/a Sovran Bank, N.A., co-executors of the Estate of Mary Morton Parsons, Deceased ("Petitioners"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case as described below.

OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Webb v. United States*, issued October 2, 1995, is reported at 66 F.3d 691 and is set out in the Appendix, *infra*, 1a to 26a. The opinion of the United States District Court for the Eastern District of Virginia, issued May 4, 1994, is reported at 850 F. Supp. 489 and is set out in the Appendix, *infra*, 27a to 38a.

STATEMENT OF JURISDICTION

The opinion of the court of appeals in *Webb v. United States* was issued October 2, 1995. Thereafter, Petitioners filed a Petition for Rehearing with Suggestion for Rehearing in Banc. Both requests were denied by the court of appeals on November 28, 1995. *See* Appendix, *infra*, 39a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. Section 6511 of the Internal Revenue Code (the "Code"), 26 U.S.C § 6511, provides in relevant part as follows:

(a) **Period of limitation on filing claim.**--Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) **Limitation on allowance of credits and refunds.**--

(1) **Filing of claim within prescribed period.**--No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) **Limit on amount of credit or refund.**--

(A) **Limit where claim filed within 3-year period.**--If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing if the claim.

(B) **Limit where claim not filed within 3-year period.**--If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

> (C) **Limit if no claim filed.**--If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

2. Section 7422(a) of the Code, 26 U.S.C. § 7422(a), provides:

> **No suit prior to filing claim for refund.**--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT OF THE CASE

In the underlying action, Petitioners sought a refund of federal gift taxes, penalties, and interest wrongfully paid to, and unjustly retained by, the Internal Revenue Service ("IRS"). These disputed amounts were paid as a result of a gift tax return filed on behalf of Mary Morton Parsons ("Parsons") for the quarter ending June 30, 1980 ("the Gift Tax Return"). Because the refund claim for the 1980 gift taxes was filed beyond the limitations period established in 26 U.S.C. § 6511,

the central issue addressed by both the district court and the court of appeals was whether, as a matter of law, § 6511 can be equitably tolled.

Parsons was a wealthy woman who, by virtue of her advanced age, declining health, and physical, emotional and mental vulnerability was, for many years, the victim of cruel physical, mental, and financial abuse by her fiduciaries, Dr. Alvin Q. Jarrett, her doctor ("Jarrett"), and B. Roland Freasier, Jr., her lawyer ("Freasier"). Jarrett and Freasier rendered Parsons totally dependent upon them by limiting her visitors, dismissing members of her household staff, providing inadequate medical care, keeping her confined to bed, and regularly administering excessive pain-killers, sleeping pills, and tranquilizers. As a result of such systematic abuse, Jarrett and Freasier were able to divert a substantial portion of Parsons' assets to themselves through supposed "gifts" to several irrevocable trusts created by them and for their benefit. These "gifts" included the transfer of 930,568 shares of common stock which were the subject of the Gift Tax Return.

When the Gift Tax Return was filed, the reported gift tax liability was $4,250,754.60. Penalties and interest

increased the gift tax obligation to $4,324,822.54, which was paid on Parsons' behalf in October 1980. The total gift tax liability was later increased to $7,584,210.52 as a result of an IRS audit of the Gift Tax Return. After additional charges for penalties and interest, the aggregate payments made to the IRS on Parsons' behalf totalled $11,362,876.88.

Due to the extraordinary nature of the abuse suffered by Parsons, it was not until April 1988 that Parsons was able to escape the dominion of Jarrett and Freasier, retain new counsel to represent her, and file a tax refund claim with the IRS seeking to recover the taxes, penalties, and interest wrongfully paid on her behalf as a result of the Gift Tax Return (the "Gift Tax Refund Claim"). After reviewing the Gift Tax Refund Claim, the IRS concluded that all of the 1980 transfers of stock shown on the Gift Tax Return were void or voidable, that no "gifts" had been made by Parsons, that no Gift Tax Return should have been filed, and that no gift taxes should have been paid. Despite these acknowledgements, the IRS refunded only that portion of the gift taxes and interest paid within two years of the filing of the Gift Tax Refund Claim. The IRS

refused to refund any earlier payments, including the October 1980 payment of $4,324,822.54, on the ground that such portions of the refund claim were untimely pursuant to § 6511 of the Code.

Parsons died on August 26, 1990. Prior to her death, Parsons created a charitable foundation which is the sole remaining beneficiary of her estate. Petitioners were appointed the executors of the Parsons Estate and commenced an action in the United States District Court for the Eastern District of Virginia seeking a refund of the taxes, penalties, and interest wrongfully paid on her behalf and disallowed by the IRS. Relying on *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), Petitioners urged that the limitations period set forth in § 6511 should be equitably tolled due to the compelling facts and circumstances of Parsons' abusive treatment by her fiduciaries. The United States moved to dismiss the refund claim for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

By final order entered May 4, 1994, the district court granted the motion to dismiss filed by the United States. Although the district court found that the facts

pled in the Complaint were sufficient to support equitable tolling, the district court nevertheless concluded that the presumption of equitable tolling established in *Irwin* did not apply to tax refund actions. Relying on *United States v. Dalm*, 494 U.S. 596 (1990), decided prior to *Irwin*, as "more instructive" than *Irwin*, the district court found that equitable considerations were not applicable to tax cases. 850 F. Supp. at 492; App., *infra*, 34a. Accordingly, because it found that equitable tolling could not apply to the limitations period set forth in § 6511 and that, therefore, the claim was untimely, the district court dismissed the action for lack of subject matter jurisdiction. 850 F. Supp. at 493; App., *infra*, 38a.

On appeal, the court of appeals, in a split decision, also concluded that § 6511 was not subject to equitable tolling and, therefore, affirmed the district court's decision, although on other grounds. Rejecting *Dalm* as "not controlling," the court of appeals recognized that in *Irwin* this Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 66 F.3d at

696; App., *infra*, 9a (quoting *Irwin*, 498 U.S. at 95-96). The court of appeals further noted that while the *Irwin* presumption of equitable tolling arose in the context of Title VII, the presumption had also been applied in a number of cases against the federal government involving other than Title VII claims. 66 F.3d at 696; App., *infra*, 10a.

Nevertheless, despite its recognition of the broad application of the *Irwin* presumption, the court of appeals refused to find that § 6511 could be tolled on equitable grounds. "Crucial to the Supreme Court's holding in *Irwin*," the court stated, "was the fact that 'the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.'" *Id.* The court of appeals reasoned that "[e]qual treatment of private and government defendants" was the "basis" for this Court's formulation of the *Irwin* presumption. Continuing, the court stated that "in *Irwin* the Supreme Court held that where equitable tolling applies in a particular action between private parties, it similarly applies in such an action against the government . . . . The Court's express goal in *Irwin* was to level the playing field between private

litigants and the government." 66 F.3d at 697; App., *infra*, 10a-11a. Thus, the court of appeals held that only where equitable tolling is recognized in claims brought by one private litigant against another should tolling on equitable grounds be applicable in a comparable claim against the government. 66 F.3d at 697; App., *infra*, 11a. Extending this interpretation of *Irwin* to tax refund cases, the court of appeals concluded that "[b]ecause tax refund suits are always brought against the government, never against private parties, the presumption announced in *Irwin* does not apply to them." 66 F.3d at 698; App., *infra*, 13a.

The court of appeals further held that, even if the *Irwin* presumption was applicable to tax refund suits, the presumption was rebutted by the provisions of § 6511. Relying on *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 705 (1994), the court of appeals found that the structure of § 6511 was "inconsistent" with the principle of equitable tolling. 66 F.3d at 699; App., *infra*, 15a. The limitations on the amount of recovery prescribed in § 6511(b)(2), the court reasoned, were analogous to a statute of repose as they establish "an outside limit on

the recovery of refunds." 66 F.3d at 700; App., *infra*, 16a-17a (quoting *Oropallo*, 994 F.2d at 30 n. 7). A statute of repose, the court noted, is "an *absolute* time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." 66 F.3d at 701; App., *infra*, 19a (quoting *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990)). Accordingly, the court of appeals concluded that "there is no presumption of equitable tolling applicable in tax refund cases, but that even if such a presumption were applicable in suits for tax refunds, that presumption has been rebutted by a statutory scheme inconsistent with equitable tolling." 66 F.3d at 702; App., *infra*, 21a.

Judge Russell dissented, stating that the holding of *Irwin* was broader than the majority recognized. Judge Russell emphasized that *Irwin* announced a "general rule" that was intended to expand the application of equitable tolling to all claims against the government. 66 F.3d at 703; App., *infra*, 23a. Rejecting the majority's analysis, Judge Russell stated that "[t]he

Supreme Court did not intend for equitable tolling to be categorically denied in actions that can be brought only against the government." Furthermore, Judge Russell in his dissent asserted that § 6511(b)(2) was "simply a statute of limitations," finding that "nothing about the structure of § 6511 or the phrasing of the caption to § 6511(b)(2) suggests that Congress intended § 6511(b)(2) to serve as an absolute cut-off of refund claims." 66 F.3d at 705; App., *infra*, 25a-26a.

Three days after the court of appeals' decision in *Webb*, the Court of Appeals for the Ninth Circuit decided, also by split decisions, *United States v. Brockamp*, 67 F.3d 260 (9th Cir. 1995), *petition for cert. filed,* No. 95-1225 (Jan. 31, 1996), and *United States v. Scott*, Nos. 94-15321, 15323 (9th Cir. Oct. 5, 1995), *petition for cert. filed,* No. 95-1225 (Jan. 31, 1996). In contrast to the Fourth Circuit's decision in *Webb*, the Ninth Circuit in *Brockamp* and *Scott* held that the *Irwin* presumption of equitable tolling was applicable to the limitations period prescribed in § 6511.

Based on this emergent conflict between the Fourth and Ninth Circuits, and upon the fact that the Fourth Circuit's decision relied upon a novel and

unprecedented interpretation of Irwin, Petitioners filed a Petition for Rehearing with a Suggestion for Rehearing in Banc with the court of appeals. Petitioners' requests for rehearing were denied on November 28, 1995.

REASONS FOR GRANTING THE PETITION

I. DECISIONS OF THE CIRCUITS, MOST RECENTLY THOSE OF THE FOURTH AND NINTH CIRCUITS, ARE IN CONFLICT AS TO THE APPLICABILITY OF THE DOCTRINE OF EQUITABLE TOLLING TO TAX REFUND ACTIONS.

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court granted certiorari "to resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred" in an effort to clarify inconsistencies in the application of the equitable tolling doctrine to federal statutes. 498 U.S. at 93. Significantly, this Court stated that "this case affords us an opportunity to adopt a *more general rule* to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95 (emphasis added). This Court announced a rule of general utility by declaring

that equitable tolling was presumed applicable in suits against the government unless Congress specifically manifested a contrary intent. 498 U.S. at 95-96. Thus, this Court in *Irwin* adopted a framework for the application of equitable tolling principles to all claims against the government. Significantly, neither tax refund claims, nor any other category of federal claim, were excepted from this presumption.

Despite the general rule adopted in *Irwin*, the presumption of equitable tolling has not been uniformly applied to the limitations period set forth in § 6511 of the Code. The decision entered by the Fourth Circuit in *Webb*, which refused to apply equitable tolling to tax refund suits, directly conflicts with decisions announced three days later by the Ninth Circuit in *United States v. Brockamp*, 67 F.3d 260 (9th Cir. 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996) and *United States v. Scott*, Nos. 94-15321, 15323 (9th Cir. Oct. 5, 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996).[1/]

[1/]Equitable tolling of tax refund claims also has been recognized in *Szpunar-Lojasiewicz v. Internal Revenue Service*, 876 F. Supp. 465 (W.D.N.Y. 1994), *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286 (D. Nev. 1994), *Brennan v. United States*, 94-1 U.S.T.C. (continued...)

Moreover, the *Brockamp* and *Scott* decisions conflict with the holding of the First Circuit in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 705 (1994). The Eleventh Circuit, in an inconclusive trilogy of cases, also has considered the applicability of equitable tolling to tax refund cases, but has declined to adopt an affirmative position regarding the applicability of the *Irwin* presumption. *See Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993); *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226 (11th Cir. 1993); *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991).

As discussed below, not only do the results in these cases conflict, the reasoning and analysis applied by the Circuits are also divergent. The clear conflict currently existing between the First, Fourth, and Ninth Circuits, and perhaps the Eleventh, should be addressed

---

1/(...continued)
¶ 50,247 (C.D. Cal. 1994), *Wiltgen v. United States*, 813 F. Supp. 1387 (N.D. Iowa 1992), and *Johnsen v. United States*, 758 F. Supp. 834 (E.D.N.Y. 1991).

by this Court in order to secure the uniform application of the doctrine of equitable tolling to tax refund cases.[2/]

A. The First Circuit

In *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 705 (1994), the First Circuit held that the *Irwin* presumption applied to tax refund suits, but then concluded that the presumption had been rebutted because the structure of § 6511 was "inconsistent with equitable tolling." In reaching this conclusion, the First Circuit analogized § 6511 of the Code to § 9(e) of the Securities Exchange Act of 1934, a provision which this Court held is not amenable to equitable tolling because it functions as a period of repose and not as a statute of limitations. 994 F.2d at 30 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)).

The First Circuit held that the dual time limitations set forth in §§ 6511(a) and (b) together

---

[2/]This issue is also presented for review by this Court pursuant to a pending Petition for a Writ of Certiorari filed January 31, 1996 by the Solicitor General on behalf of the United States in *United States v. Brockamp* and *United States v. Scott*, No. 95-1225.

functioned as more than a statute of limitations. Section 6511(a), the court found, "serves simply to identify which taxpayers have properly positioned themselves to obtain a refund." 994 F.2d at 30. However, § 6511(b), the First Circuit reasoned, contains a substantive limit on the right to recover because it limits refunds to amounts paid within the two- or three-year period preceding the filing of a claim, depending on whether a tax return was filed. 994 F.2d at 30-31. Accordingly, the court found that § 6511(b)(2)(A) serves as "an absolute cut-off point" which operates as a "'period of repose inconsistent with tolling."[3/] 994 F.2d at 31. Thus, despite the court's

---

[3/] *Oropallo's* categorization of § 6511(b)(2) as a statute of repose, however, has been seriously undermined by this Court's discussion of § 6511 in *Commissioner v. Lundy*, ___ U.S. ___, 64 U.S.L.W. 4061 (U.S. Jan. 17, 1996)(No. 94-1785). In *Lundy*, this Court stated that § 6511 "establishes a filing deadline: The taxpayer must file a claim for a refund 'within 3 years from the time the return was filed or 2 years from the time the tax was paid . . . '." Continuing, this Court described § 6511(b) as defining two "look-back" periods:

> If the claim is filed 'within 3 years from the time the return was filed,' *ibid.*, then the taxpayer is entitled to a refund of 'the portion of the tax paid within the 3 years immediately preceding the filing of the claim.' § 6511(b)(2)(A) (incorporating by reference § 6511(a)). If the claim is not filed within that 3-year period, then the taxpayer is entitled to a

(continued...)

recognition that the general rule announced in *Irwin* did apply to tax refund cases, the First Circuit held in *Oropallo* that § 6511 could not be equitably tolled because the *Irwin* presumption was rebutted by the operation of the statute.

B. The Eleventh Circuit

The Eleventh Circuit has examined the applicability of equitable tolling to tax refund claims in three cases. In *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991), the court concluded that equitable tolling cannot be applied to extend the limitations period set forth in § 6511. 931 F.2d at 1446-47. In so holding, the court relied on this Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990), a pre-*Irwin* case which, as characterized by the Eleventh Circuit, "explained the reasoning behind strict adherence to the limitations

---

3/(...continued)

> refund of only that 'portion of the tax paid during the 2 years immediately preceding the filing of the claim.

Id. at ___, 64 U.S.L.W. at 4062-4063. This discussion of § 6511(b) contains no reference to a "statute of repose" as suggested in *Oropallo*.

period in tax refund suits under sections 7422 and 6511(a)." 931 F.2d at 1446.[4/]

In addressing the equitable tolling issue, the court largely ignored the relevance of the *Irwin* presumption. In a footnote, the court noted that "[t]he *Irwin* Court made no attempt to reconcile [the presumption of equitable tolling] with the seemingly contradictory language of *Dalm*." 931 F.2d at 1447, n. 1. Continuing, the Eleventh Circuit concluded that even if *Irwin* applied to tax refund suits, the grounds asserted by the appellants were insufficient to equitably toll their claim. *Id.*

The Eleventh Circuit, however, seems to have since modified its position in *Vintilla* that *Dalm* is controlling. In *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226 (11th Cir. 1993), decided almost

---

[4/]Petitioners contend that *Dalm* has no applicability to the equitable tolling of tax refund actions under § 6511. First, *Dalm* was decided nine months before *Irwin*. Second, *Dalm* addresses the issue of equitable recoupment, an issue narrowly confined to instances in which the government has taxed a single transaction, time or event under two inconsistent theories. *Dalm*, 494 U.S. at 606, n. 5. Consequently, *Irwin*, as the most recent and most relevant decision of this Court, is controlling as to whether equitable tolling should apply to tax refund suits. *See infra* note 7.

two years after *Vintilla*, the Eleventh Circuit again addressed whether equitable tolling principles can be applied to tax refund claims. Ignoring *Dalm* in favor of *Irwin*, the court assumed *arguendo* that "the statute of limitations governing tax refund suits . . . may under some circumstances be equitably tolled." 981 F.2d at 1228. Ultimately, however, the court concluded that the taxpayers' reasons for invoking equitable tolling were insufficient. Similarly, in *Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993), the Eleventh Circuit again assumed *arguendo* that the limitations period applicable to tax refund actions could be tolled, although it declined to apply tolling based on the facts presented. Accordingly, this series of decisions suggests that *Irwin*, rather than *Dalm*, is now considered controlling on this issue in the Eleventh Circuit.

C. The Fourth Circuit

In *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995), the Fourth Circuit concluded that the *Irwin* presumption of equitable tolling could not be applied to tax refund suits. *Webb*, however, unlike *Vintilla*, found that "*Dalm* is not controlling here." 66 F.3d at 698;

App., *infra*, 14a. Notably, the *Webb* decision, in rejecting principles of equitable tolling, applied a reading of *Irwin* not adopted by any other court.

In *Webb*, the Fourth Circuit reached the unique conclusion that because tax refund suits could not be brought against private parties, the presumption of equitable tolling announced in *Irwin* did not apply to such claims.[5] 66 F.3d at 698; App., *infra*, 13a. Because "[e]qual treatment of private and government defendants" was the "basis" for the *Irwin* presumption, the court reasoned, only where equitable tolling applies in an action between private parties can it similarly apply in an action against the government.[6] 66 F.3d at 696-97;

---

[5] The unprecedented nature of its reading of *Irwin* was recognized by the Fourth Circuit majority, which stated "[s]ignificantly, no court has grappled with what we believe to be the critical distinction--for equitable tolling purposes--between tax refund suits and most other actions against the federal government." 66 F.3d at 696; App., *infra*, 10a.

[6] The Fourth Circuit's interpretation imposes an additional prerequisite to the application of the *Irwin* presumption by requiring that an action be available against both a private party and the government. This uniquely restrictive interpretation is contrary to a host of post-*Irwin* decisions in which courts have effectively applied the presumption of equitable tolling to all types of statutory schemes (continued...)

App., *infra*, 10a-11a. "The Court's express goal in *Irwin*," the Fourth Circuit stated, "was to level the playing field between private litigants and the government." 66 F.3d at 697; App., *infra*, 11a. Thus, because tax refund suits

---

[6]/(...continued)
and specific provisions--including those which *only* provide for suits against the government and *not* against private parties. *See, e.g., Supermail Cargo Inc. v. United States*, 68 F.3d 1204 (9th Cir. 1995)(wrongful tax levy action); *Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995)(wrongful tax levy action); *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3469 (Dec. 26, 1995)(The Quiet Title Act); *Medellin v. Shalala*, 23 F.3d 199 (8th Cir. 1994)(Social Security Act); *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564 (Fed. Cir. 1993), *cert. denied*, 113 S.Ct. 2995 (1993)(The Tucker Act); *Justice v. United States*, 6 F.3d 1474 (11th Cir. 1993)(Public Vessels Act); *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993)(Civil Service Reform Act); *Razaino v. United States*, 999 F.2d 1539 (11th Cir. 1993)(Suits in Admiralty Act); *Ammer v. United States*, 881 F. Supp. 1007 (D. Md. 1994), *aff'd*, 56 F.3d 60 (4th Cir. 1995) (Public Vessels Act); *Raspberry v. Secretary of Health & Human Services*, 32 Fed. Cl. 777, *rev'd on other grounds*, 33 Fed. Cl. 420 (1995)(National Childhood Vaccine Injury Act of 1986); *Farris v. United States*, 877 F. Supp. 1549 (M.D. Fla. 1994)(Suits in Admiralty Act); *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286 (D. Nev. 1994)(tax refund action); *Szpunar-Lojasiewicz v. Internal Revenue Service*, 876 F. Supp. 465 (W.D.N.Y. 1994)(tax refund action); *George F. Miller Farms, Ltd. v. United States*, 27 Fed. Cl. 672 (1993)(The Tucker Act); *Wiltgen v. United States*, 813 F. Supp. 1387 (N.D. Iowa 1992)(tax refund action); *Golbach v. Sullivan*, 779 F. Supp. 9 (N.D.N.Y. 1991)(Equal Access to Justice Act); *Johnsen v. United States*, 758 F. Supp. 834 (E.D.N.Y. 1991)(tax refund action). There is nothing unique in the nature of tax refund claims that distinguishes such claims from other actions against the government. Accordingly, there is no justification for refusing to extend the *Irwin* presumption of equitable tolling to tax refund suits as well.

cannot be brought against private parties, the court concluded, the presumption of equitable tolling was inapplicable. 66 F.3d at 698; App., *infra*, 13a.

Additionally, the court opined that even if the *Irwin* presumption was applicable to tax refund suits, the presumption "ha[d] effectively been rebutted here." 66 F.3d at 699; App., *infra*, 14a. Adopting part of the *Oropallo* analysis, the Fourth Circuit found that the statutory framework of § 6511 was inconsistent with equitable tolling because it functioned as a statute of repose. 66 F.3d at 700; App., *infra*, 16a-17a.

D. The Ninth Circuit

Finally, in direct contrast to the decision of the Fourth Circuit three days earlier, the Ninth Circuit held on October 5, 1995, also in a split decision, that equitable tolling of § 6511 was proper pursuant to the *Irwin* presumption. In *United States v. Brockamp*, 67 F.3d 260 (1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996), the Ninth Circuit ruled that this Court in *Irwin* pronounced a "new, general rule" which "effectively

limited the *Dalm* decision."[7/] 67 F.3d at 262. *Irwin*, the Ninth Circuit found, "requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States." 67 F.3d at 262.

The Ninth Circuit held that the "language of [§ 6511] does not speak to the application of equitable tolling principles" and that "Congress has never expressed any intention that equitable tolling should not apply to § 6511." *Id.* In so concluding, the court specifically rejected the holding of the First Circuit in *Oropallo*, also adopted by the Fourth Circuit in *Webb*, that § 6511 functions as a substantive statute of repose. Rather, the Ninth Circuit viewed §§ 6511(a) and (b) as dissimilar to § 9(e) of the Securities Exchange Act of 1934 because § 6511(a) was not an "open-ended provision" and, therefore, § 6511(b) did not "close the door on an open-ended provision" as described in *Oropallo*. 67 F.3d at

---

[7/] By rejecting *Dalm*, the Ninth Circuit likewise rejected the reasoning of the Eleventh Circuit in *Vintilla*, 931 F.2d at 1446-47. In addition, the Fourth Circuit in *Webb*, and the *First Alabama Bank*, *Rosser*, and *Oropallo* decisions, as noted above, have also rejected the applicability of *Dalm*. *See also First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286 (D. Nev. 1994).

262, n. 1.[8/] Accordingly, the Ninth Circuit held that the presumption of equitable tolling announced in *Irwin* applies to tax refund claims, just as it does to all other claims against the United States, stating that "it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility." 67 F.3d at 263.

The Ninth Circuit subsequently adopted the reasoning of *Brockamp* in *Scott v. United States*, Nos. 94-15321, 15323 (9th Cir. Oct. 5, 1995), *petition for cert.*

[8/] Petitioners also contend that § 6511 is not comparable to § 9(e). First, in analogizing these provisions, *Oropallo* assumed that a tax return may be filed at any time after the due date and still trigger the commencement of the three year period under § 6511(a). Thus, the court reasoned that the limitations period of § 6511(a) was "totally illusory" and, therefore, similar to the discovery trigger of § 9(e). However, the Ninth Circuit in *Miller v. United States*, 38 F.3d 472 (9th Cir. 1994), has since ruled that only a timely filed tax return can start the three year limitation period of § 6511(a). *See also Musser v. United States*, 92-1 U.S.T.C. ¶ 50,245 (D. Alaska 1991); *Amzen v. Internal Revenue Service*, 91-1 U.S.T.C. ¶ 50,020 (W.D.Wash. 1990). Thus, the First Circuit's conclusion that § 6511(a) functions as a discovery trigger with "built-in" tolling provisions, was erroneous. Second, § 6511(b)(2) defines the amount of recovery based upon whether a return was filed but does not operate as an absolute bar to proceeding as does the three-year provision of § 9(e). Unlike § 9(e), there is no clear congressional intent to preclude tolling under § 6511.

filed, No. 95-1225 (Jan. 31, 1996), an unpublished decision rendered the same day as *Brockamp*. In affirming the final judgment for the taxpayer in *Scott*, the Ninth Circuit reiterated that § 6511 can be equitably tolled consistent with the *Irwin* presumption.

II. THE ISSUES PRESENTED BY THIS APPEAL ARE OF EXCEPTIONAL IMPORTANCE AND SHOULD BE ADDRESSED BY THIS COURT.

The question of whether tax refund actions, among the most frequently litigated claims against the government, are amenable to equitable tolling is an issue of significant public importance. The applicability of equitable tolling principles to tax refund claims would present no demonstrable prejudice to the government. In contrast, permitting the retention by the government of wrongfully paid taxes under the unique circumstances presented by the Petitioners, or as set forth in *Brockamp* and *Scott*, allows the government to unfairly and unjustly benefit at the expense of such taxpayers. Condoning the wrongful retention of taxes simply because of a refusal to recognize and apply well-settled equitable principles to a tax refund case is poor public policy and

undermines the public's confidence in a fairly administered tax system.

Furthermore, as noted by the United States in its pending Petition for Writ of Certiorari in *Brockamp* and *Scott*, the applicability of equitable tolling to untimely tax refund suits is an issue of "substantial administrative importance." Petition for Writ of Certiorari at 20, *Brockamp v. United States* and *Scott v. United States* (No. 95-1225). Diminished mental capacity or other compelling circumstances which impair a taxpayer's ability to timely file a refund claim are issues that both the IRS and the courts will be caused to confront again in the future. The nature of the tax system demands that such claims be handled fairly and consistently throughout the Circuits to insure just application of the tax laws. The clear conflict currently existing between the First, Fourth, and Ninth Circuits precludes such evenhanded application of the doctrine of equitable tolling to tax refund actions and erodes the effect of the general rule announced in *Irwin*.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

CLINTON S. WEBB AND NATIONSBANK, OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS, DECEASED

Charles F. Witthoefft, Counsel of Record
Everette G. Allen, Jr.
John C. Ivins, Jr.
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN, P.C.
The Federal Reserve Bank Building
701 East Byrd Street
Post Office Box 500
Richmond, VA 23218-0500
(804) 771-9500

Counsel for Petitioners

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CLINTON WEBB; NATIONSBANK OF VIRGINIA, N.A., formerly known as Sovran Bank, N.A., Co-executors of The Estate of Mary Morton Parsons, Deceased,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 94-1854

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-93-847)

Argued: June 7, 1995

Decided: October 2, 1995

Before RUSSELL and MOTZ, Circuit Judges, and FABER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Motz wrote the majority opinion, in which Judge Faber joined. Judge Russell wrote a dissenting opinion.

COUNSEL

ARGUED: Charles Frederick Witthoefft, HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, Richmond, Virginia, for

Appellants. Gilbert Steven Rothenberg, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Everette G. Allen, Jr., John C. Ivins, Jr., HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, Richmond, Virginia, for Appellants. Loretta C. Argrett, Assistant Attorney General, Gary R. Allen, Bridget M. Rowan, Helen F. Fahey, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The sole question presented in this case is whether certain provisions of the Internal Revenue Code governing tax refund claims are subject to equitable tolling. The district court held that they were not; we affirm, although on somewhat different grounds than those relied upon by the district court.

I.

Clinton Webb and Nationsbank of Virginia, N.A., f/k/a Sovran Bank, N.A. ("Nationsbank"), in their capacities as co-executors of the estate of Mary Morton Parsons, filed this action in the United States District Court for the Eastern District of Virginia seeking a refund of gift taxes, penalties, and interest that they assert were wrongfully paid on Parsons' behalf in October, 1980. For purposes of this appeal, we take the facts and circumstances alleged in the complaint as true. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991); *White v. United States*, 53 F.3d 43, 44 (4th Cir. 1995).

Parsons was a long-time resident of Richmond, Virginia. Born in 1902, she was the only child of one of the founders of a local life insurance company and thus enjoyed considerable wealth. Having only a limited understanding of financial matters, however, Parsons relied on others to manage her affairs. After Parsons' husband died, her sister-in-law, Lelia Parsons, moved into her residence in order to manage her personal affairs. Upon her sister-in-law's death in 1972,

Parsons retained the services of Dr. Alvin Q. Jarrett, a social acquaintance, as both her personal physician and to oversee her personal and financial affairs. Jarrett in turn retained B. Roland Freasier, Jr. to serve as Parsons' personal legal counsel.

Through systematic physical and emotional abuse during the ensuing fourteen years, Jarrett and Freasier induced Parsons to relinquish to them total control over her day-to-day affairs. They persuaded her to move into virtual seclusion in Virginia Beach, Virginia, where they confined her to her bed under heavy sedation. They discharged most of Parsons' household staff and prevented her from receiving mail or telephone calls and from seeing visitors. They also induced her to grant to each of them powers-of-attorney, thus enabling them to manipulate her financial affairs for their own benefit.

As a result of their fraudulent activities, Jarrett and Freasier were able to divert a substantial portion of Parsons' assets to themselves and their families without Parsons' knowledge or consent. One such transaction involved the unauthorized transfer to Jarrett and Freasier of 930,568 shares of Parsons' stock. In connection with this transaction, Jarrett and Freasier filed a gift tax return on Parsons' behalf with the Internal Revenue Service ("IRS") on August 18, 1980, and in October, 1980 they paid to the IRS, out of Parsons' own funds, a gift tax in the amount of $4,324,822.54, together with certain penalties and interest. After a subsequent audit by the IRS, Jarrett and Freasier paid in excess of $7,000,000.00 in additional gift taxes, penalties, and interest in 1986 and 1987, again out of Parsons' own funds, bringing the total assessment against Parsons for these illicit stock transfers to $11,362,876.88.

Parsons eventually discovered the fraudulent transfers in the summer of 1987 and filed an action in state court to recover her lost assets. Upon recovering substantially all of the stock transferred to Jarrett and Freasier, Parsons filed a claim with the IRS on April 5, 1988 seeking a refund of the gift taxes, penalties, and interest paid in connection with the fraudulent transfers. Acknowledging that the taxes were wrongfully paid, the IRS refunded a total amount of $9,844,541.03, which included the taxes paid in 1986 and 1987, but declined to refund any amount paid more than two years prior to the filing of Parsons' refund claim, *i.e.*, the $4,324,822.54 paid in 1980.

Webb and Nationsbank, as co-executors of Parsons' estate, brought this action seeking to recover the disallowed portion of Parsons' refund claim. Because the refund claim was concededly untimely under § 6511 of the Internal Revenue Code of 1954, 26 U.S.C. § 6511, the district court held that it lacked subject matter jurisdiction and so dismissed the action. The court determined that if § 6511 could be equitably tolled, the complaint set forth facts that "would have established the applicability of equitable tolling to this case," but found equitable tolling was not permissible in tax cases. 850 F. Supp. 489, 493 (E.D. Va. 1994). Relying on *United States v. Dalm*, 494 U.S. 596 (1990), as "more instructive" than *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *id.* at 492, the court concluded that the tax laws were technical provisions that must be rigorously enforced.

II.

The United States, as sovereign, is immune from suit unless it waives that immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). A statute of limitations requiring that a suit against the government be brought within a certain time period constitutes a condition on the government's waiver of immunity, *United States v. Mottaz*, 476 U.S. 834, 841 (1986), and as such should be "construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the [statutory] language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (citations and internal quotations omitted); *see also Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended'" (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)).

With respect to suits against it for tax refunds, of course, the United States has to some extent waived its sovereign immunity. Section 1346(a)(1) of Title 28 of the United States Code gives federal district courts jurisdiction over suits against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." However, the general jurisdictional grant in § 1346(a)(1) must be read to incorporate the requirements of 26 U.S.C. §§ 7422(a) and 6511(a). *United States v. Dalm*, 494 U.S.

596, 601-02, 609 (1990); *see also United States v. Forma*, 42 F.3d 759, 763 (2d Cir. 1994) ("statutory provisions and court interpretations have placed a number of conditions on the explicit waiver of sovereign immunity instituted through 28 U.S.C. § 1346(a)(1)"). Section 7422(a) provides that no suit for a tax refund may be maintained unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." Section 6511, in turn, constitutes one of these "provisions of law" governing refund claims.

Specifically, § 6511(a) sets forth the applicable statute of limitations for claims for credits or refunds under the Internal Revenue Code. It provides in pertinent part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Section 6511(b) then sets forth certain "[l]imitation[s] on allowance of credits and refunds," providing in subsection (b)(1) that:

> [n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

Finally, § 6511(b)(2) sets forth certain "[l]imit[s] on amount of credit or refund" as follows:

> (A) *Limit where claim filed within 3-year period.*
>
> If the claim [for refund] was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the

> credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.
>
> (B) *Limit where claim not filed within 3-year period.*
>
> If the claim [for refund] was not filed within such 3-year period [prescribed in subsection (a)], the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

The parties here agree that the refund claim that was filed on April 5, 1988 was untimely under the plain language of § 6511 because it was filed more than three years after the date on which the gift tax return was filed (August 18, 1980), and more than two years after the date on which the relevant portion of the gift tax was paid (October, 1980). The sole issue presented in this case is whether § 6511 is subject to equitable tolling. The district court concluded that it was not and that Parsons' refund claim was therefore time-barred, thus depriving the court of subject matter jurisdiction.

If this case had arisen prior to 1990, there would seemingly be no question that the district court's holding was correct. Because a statute of limitations is a condition on the government's waiver of sovereign immunity and thus must be "strictly observed," *Block*, 461 U.S. at 287, courts have traditionally declined to permit equitable considerations to toll statutes of limitations in cases against the United States. *See, e.g., Soriano v. United States*, 352 U.S. 270 (1957). Moreover, equity generally plays a very limited role in tax cases. *See, e.g., Lewyt Corp. v. Commissioner of Internal Revenue*, 349 U.S. 237, 249 (1955) (Frankfurter, J., dissenting) ("Where the taxing measure is clear, of course, there is no place for loose conceptions about the 'equity of the statute' . . . . [O]ne should sail close to the shore of literalness in dealing with the technical problems which are the subject matter of revenue laws"). Thus, the task of an appellate court in such cases is "not that of weighing equities, but of determining technical application of the law [consistent] with the well-established view that tax laws are technical and, for the most part, are to be accordingly interpreted."

Ewing v. United States, 914 F.2d 499, 501 (4th Cir. 1990) (citations omitted), *cert. denied*, 500 U.S. 905 (1991); *see also Chertkof v. United States*, 676 F.2d 984, 991 n.13 (4th Cir. 1982) ("The world at large, and the income-tax world in particular, are full of hardship and loss despite which it is deemed sound policy to enforce general rules inflexibly.") (quoting J.M. Maguire et al., "Section 820 of the Revenue Act of 1938," 48 Yale L.J. 509, 515 (1939)).

Not only are equitable principles generally of limited application in tax cases, but statutes of limitations have long been considered of particular importance in such cases. As the Supreme Court explained almost fifty years ago:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Rothensies v. Electric Battery Co., 329 U.S. 296, 301 (1946). The Court noted that statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the [avoidable] and unavoidable delay. They have come into the law not through the judicial process but through legislation." *Id.* at 301-02 (citation and internal quotations omitted). Accordingly, "[a]s statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out." *Id.* at 302 (footnote omitted). Thus, "[i]f there are to be exceptions to the statute of limitations [in tax cases], it is for Congress rather than for the courts to create and limit them." *Id.* at 303; *see also Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. This is especially so when courts construe a statute of limitations, which must receive a strict construction in favor of the

Government." (citations and internal quotations omitted)). Therefore, in light of the "indispensable" role played by statutes of limitations in tax cases and the limited relevance of equitable principles in such cases generally, it is not surprising that the taxpayers here are unable to cite to any instance, prior to 1990, in which any court has held equitable tolling applicable to tax refund claims.

However, in 1990 the Supreme Court issued its opinion in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), a case that the taxpayers here assert radically changed these well-established rules. *Irwin* involved a Title VII discriminatory discharge suit brought against the United States by an employee who had been fired from his job with the Veteran's Administration. The employee filed a complaint with the Equal Employment Opportunities Commission (EEOC) alleging that he had been unlawfully discharged on the basis of his race and physical disability. The EEOC dismissed his complaint by letter dated March 19, 1987, informing him that he had a right to file a civil action under Title VII within 30 days. However, according to the employee, he did not receive the EEOC dismissal letter until April 7, 1987. He filed a complaint on May 6, 1987, which the district court deemed untimely and dismissed for lack of subject matter jurisdiction. The court of appeals affirmed, holding that the 30-day period under Title VII operated as an absolute jurisdictional limit.

In the Supreme Court, as he had below, the employee in *Irwin* asserted that the 30-day filing period under Title VII was subject to equitable tolling. *See* Brief for Petitioner at 10-11. He noted that the time limits for Title VII suits against private employers were subject to equitable tolling, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), and that the Court had previously concluded that principles applicable to private-sector Title VII cases were equally applicable to public sector cases, *see Chandler v. Roudebush*, 425 U.S. 840, 864 (1976). Citing Title VII's legislative history, the employee argued that Congress intended to extend the same rights and remedies to federal employees that had already been provided to private-sector employees, and that therefore the time limits for Title VII suits against the federal government should similarly be subject to equitable tolling. *See* Brief for Petitioner at 9; *see also* Brief for Amicus Curiae National Treasury Employees Union in Support of

Petitioner at 12-13. The government had to concede that the Court had permitted equitable tolling in similar suits against private employers but argued that "[s]uits against the sovereign . . . are not the same as suits against private parties." Brief for the Respondents at 6. There was no suggestion made by any party that the case should apply beyond the context of Title VII.

The Supreme Court in *Irwin* concluded that compliance with the limitations period at issue there was not an absolute jurisdictional predicate to filing a Title VII suit against the federal government but instead could be equitably tolled. In so holding, the Court specifically noted that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." 498 U.S. at 95 (footnote omitted). Accordingly, the Court concluded that "*the same rebuttable presumption of equitable tolling applicable to suits against private defendants* should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96 (emphasis added).

Obviously, the Supreme Court could have confined its holding in *Irwin* to claims arising under Title VII, or to those arising under remedial statutes generally. The Court had previously applied the doctrine of equitable tolling in a limited number of cases involving remedial statutes, concluding that it was consistent with Congress' intent in enacting statutes that were "humane and remedial," *see Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427-28 (1965) (regarding the Federal Employers' Liability Act), or that were "unusually protective" of claimants, *see Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (regarding the Social Security Act), thereby "honor[ing] the remedial purpose of the legislation as a whole," *see Zipes*, 455 U.S. at 398. The Court could have similarly limited its holding in *Irwin*. However, the language employed in *Irwin* is clearly much broader than that. Indeed, the Supreme Court, after noting that its prior practice of deciding each case on an *ad hoc* basis had the "disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress," expressly stated that it was announcing a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95.

Consistent with this broad language, *Irwin*'s "rebuttable presumption of equitable tolling" has since been applied in cases against the federal government other than those arising under Title VII. *See, e.g., Fadem v. United States*, 52 F.2d 202, 205-06 (9th Cir. 1995) (Quiet Title Act); *Goodhand v. United States*, 40 F.3d 209, 213 (7th Cir. 1994) (Federal Tort Claims Act); *Glarner v. United States, Dept. of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994) (same); *Long v. Frank*, 22 F.3d 54, 58 (2d Cir. 1994) (ADEA), *cert. denied*, ___ U.S. ___, 115 S. Ct. 938 (1995); *Justice v. United States*, 6 F.3d 1474, 1478 (11th Cir. 1993) (Public Vessels and Suits in Admiralty Acts); *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1571-72 (Fed. Cir.) (Tucker Act), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2995 (1993); *Nunnally v. MacCausland*, 996 F.2d 1, 3-4 (1st Cir. 1993) (Civil Service Reform Act). Thus, courts have applied the "presumption" enunciated in *Irwin* in a variety of contexts.

Courts are divided, however, as to whether the rebuttable presumption of equitable tolling applies in tax refund cases. *See, e.g., Brockamp v. United States*, 859 F. Supp. 1283, 1287-89 (C.D. Cal. 1994) (equitable tolling inapplicable), *appeal pending*, No. 94-56424 (9th Cir.); *Scott v. United States*, 847 F. Supp. 1499, 1504-07 (D. Haw. 1993) (tolling applies; § 6511 equitably tolled by taxpayer's alcoholism), *appeals pending*, Nos. 94-15321, 94-15323 (9th Cir.); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992) (tolling applies; § 6511 equitably tolled by taxpayer's mental illness); *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991) (same); *see generally* Ronald A. Stein, "Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?" 81 J. Tax'n 370 (Dec. 1994). Significantly, no court has grappled with what we believe to be the critical distinction—for equitable tolling purposes—between tax refund suits and most other actions against the federal government.

Crucial to the Supreme Court's holding in *Irwin*, that equitable tolling applies in suits under Title VII against the United States, was the fact that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." 498 U.S. at 95. Equal treatment of private and government defendants was also the basis for the Court's formulation of its "general rule," *i.e.*, that "the same rebuttable presumption of equitable tolling applicable

to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court reasoned that

> [o]nce Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, *in the same way that it is applicable to private suits*, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

Id. at 95 (emphasis added).

Thus, in *Irwin* the Supreme Court held that where equitable tolling applies in a particular action between private parties, it similarly applies in such an action against the government. This makes sense as a "realistic assessment of legislative intent," for unless specified otherwise, there is no reason to assume that Congress would intend to make it inherently more difficult to bring suit against the government than against a private defendant.[1] It also makes sense as a "practically useful principle of interpretation," enabling courts simply to apply the same equitable principles that are relevant in the private-sector context to public-sector cases, without requiring further inquiry into specific congressional intent. The Court's express goal in *Irwin* was to level the playing field between private litigants and the government.

Accordingly, when equitable tolling applies in a case brought against a private litigant, it follows that equitable tolling should presumptively apply in a comparable case against the United States. *See also id.* at 97 (White, J., concurring in part and concurring in the judg-

[1]As the Court in *Irwin* confirmed, the reverse holds true as well:

> Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

498 U.S. at 96.

ment) ("*like statutes of limitations for suits between private litigants*, limitations periods for suits against the Government will now *presumptively* be subject to equitable tolling" (first emphasis added)). Tellingly, in finding *Irwin*'s "presumption of equitable tolling" applicable in other contexts, courts have consistently recognized this principle, *i.e.*, that the government should be treated in the same manner as a private defendant, as the rationale for the Court's holding in *Irwin*. *See, e.g.*, *Fadem*, 52 F.3d at 205-06; *Glarner*, 30 F.3d at 701; *Justice*, 6 F.3d at 1478 n.13; *Nunnally*, 996 F.2d at 3; *Catawba Indian Tribe*, 982 F.2d at 1571.

Unlike tort actions or employment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants. Taxation is neither a "penalty imposed on the taxpayer nor a liability which he assumes by contract." *Welch v. Henry*, 305 U.S. 134, 146 (1938). "The power to tax 'is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation . . . .'" *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435, 444-45 (1944) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819)). It constitutes an exercise of the government's "sovereign rights," rather than an attempt "to enforce either on its own behalf or that of private parties what are in the nature of private rights." *See United States v. Administrative Enterprises, Inc.*, 46 F.3d 670, 673 (7th Cir. 1995).[2]

Thus, taxes are "different." *Forma*, 42 F.3d at 765. They "are the life-blood of government." *Bull v. United States*, 295 U.S. 247, 259 (1935). "A tax, in the general understanding of the term, and as used

[2]Chief Judge Posner, in a recent case addressing the applicability of the doctrine of laches against the government, suggested the possibility of "draw[ing] a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights," and allowing equitable relief only in the former class of cases. *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670, 673 (7th Cir. 1995). The language in *Irwin* certainly supports this distinction.

in the Constitution, signifies an exaction for the support of the Government." *United States v. Butler*, 297 U.S. 1, 61 (1936). "It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens," *Welch*, 305 U.S. at 146, "[and even taxes] on the exercise of personal rights and privileges .... were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937).

By definition, then, tax refund suits are limited to cases where a taxpayer is suing the government for a refund. Because tax refund suits are always brought against the government, never against private parties, the presumption announced in *Irwin* does not apply to them. Since there can be no equitable tolling in such suits against private defendants, the rule in *Irwin* that "the *same* rebuttable presumption of equitable tolling *applicable to suits against private defendants* should also apply to suits against the United States" has no force here. Applying the doctrine of equitable tolling in a tax refund action, like this one, would neither serve as a "realistic assessment of legislative intent" nor as a "practically useful principle of interpretation," and nothing counsels a departure here from the traditional judicial reluctance to introduce equitable principles into the tax laws.[3]

Indeed, just nine months prior to *Irwin* the Supreme Court stressed the importance of strictly construing statutes of limitations in the tax context, noting:

[3]Recently, in *Capital Tracing, Inc. v. United States*, No. 92-55885, 1995 U.S. App. LEXIS 22523 (9th Cir. Aug. 17, 1995), the Ninth Circuit, after noting that "'the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States,'" *id.* at *8 (quoting *Irwin*, 498 U.S. at 95-96), inexplicably went on to hold this presumption applicable to a wrongful levy suit that could only be brought against the government. *Id.* at *10. The Ninth Circuit did not explain why the *Irwin* presumption should apply to a suit against the government that could not be brought against a private defendant, and indeed the court failed even to acknowledge this inconsistency. Accordingly, we do not find *Capital Tracing* persuasive.

> The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.

Dalm, 494 U.S. at 609-10 n.7. The government here contends that *Dalm* controls this case. In fact, *Dalm* holds only that the doctrine of equitable recoupment, applicable where the government has taxed a single taxable event under two inconsistent theories, cannot be "the sole basis for jurisdiction" for an untimely refund claim where the taxpayer has already litigated her tax liability without raising such a claim. *Id.* at 611. As Justice Stevens observed in dissent, "[t]his is not a decision that will be much celebrated or often cited [and] [f]ew cases are affected . . . . The case casts a shadow on the Executive—and on this Court—but otherwise has no apparent importance." *Id.* at 612 (Stevens, J., dissenting, joined by Marshall and Brennan, JJ.). Thus, *Dalm* is not controlling here. But the holding in *Dalm* is a strong indication by the Supreme Court, almost contemporaneous with the rule announced in *Irwin*, that equity is not to displace the strict time limits set forth in the Internal Revenue Code. *Id.* at 610-11. Significantly, the Supreme Court's opinion in *Irwin* did not purport to modify *Dalm*; indeed, *Irwin* failed even to mention *Dalm*.

Accordingly, in view of the special nature of tax refund suits and given the well-established significance of statutes of limitations in tax cases and the limited relevance of equitable principles in such cases, we conclude that *Irwin*'s rebuttable presumption of equitable tolling is not applicable in tax refund suits.

III.

Even if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail here because that presumption is, in all events, rebuttable and has effectively been rebutted here. In addition to holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," the *Irwin*

Court emphasized that "Congress, of course, may provide otherwise if it wishes to do so." *Irwin*, 498 U.S. at 95-96. To date, only one circuit has reached the question of whether *Irwin*'s presumption of equitable tolling has in fact been rebutted in the present context. *See Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 705 (1994).[4] There, the First Circuit, in an opinion joined by then Judge Breyer, answered that question in the affirmative. In *Oropallo*, a taxpayer discovered that he had overpaid his taxes and sought a refund nearly eight years later. The IRS rejected his claim as untimely. The taxpayer filed suit against the government, arguing that the limitations period of § 6511(a) should be equitably tolled due to his incarceration and alleged carbon monoxide poisoning, which rendered him incapacitated for several years subsequent to the tax overpayment.

While apparently concluding that *Irwin*'s general presumption as to equitable tolling was applicable in tax refund suits, the First Circuit found that this presumption had been rebutted by a statutory scheme that is inconsistent with equitable tolling. *Id.* at 31. The *Oropallo* court heavily relied on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), where the Supreme Court considered whether to adopt a federal limitations period in private suits under § 10(b) of the Securities Exchange Act of 1934, and, if so, whether that period would be subject to equitable tolling. After examining the text of § 10(b), the Court in *Lampf* selected a 1-and-3-year

[4]The only other circuit to consider the applicability of equitable tolling principles in a tax refund case, the Eleventh Circuit, concluded that "general principles of equity may not override statutory requirements for timely filing of tax refund claims." *Vintilla v. United States*, 931 F.2d 1444, 1446 (11th Cir. 1991) (citations and internal quotations omitted). In so concluding, the court in *Vintilla* relied primarily on *Dalm*; it referenced *Irwin* only in a footnote, noting that in any event the taxpayers there did not merit equitable relief. *Id.* at 1447 n.1. In subsequent cases the Eleventh Circuit has assumed *arguendo* that "the statute of limitations governing tax refund suits . . . may under some circumstances be equitably tolled." *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1228 (11th Cir. 1993); *see also Rosser v. United States*, 9 F.3d 1519, 1523 n.4 (11th Cir. 1993). The Seventh Circuit has left the issue open. *See Overhauser v. United States*, 45 F.3d 1085, 1089 (7th Cir. 1995).

limitations period comparable to § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), which provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf*, 501 U.S. at 358-61 and n.6. Citing *Irwin*, the Court acknowledged that "[t]ime requirements in law suits . . . are customarily subject to equitable tolling." *Id.* at 363 (internal quotations omitted). It also recognized that, in fraud cases, the limitations period does not usually begin running until the fraud is discovered. *Id.* Nevertheless, the *Lampf* Court concluded that § 9(e) is not subject to equitable tolling because "the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure." *Id.* The Court explained that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary," and that the 3-year period acts as an "outside limit," itself "inconsistent with tolling." *Id.* (citation and internal quotations omitted).

After comparing § 6511 of the Internal Revenue Code with § 9(e) of the Securities Exchange Act, the First Circuit in *Oropallo* held that, "[b]ecause, together, section 6511(a) and (b)(2)(A) function like the 1-and-3-year period found inconsistent with equitable tolling in *Lampf*, we conclude that those provisions may not be equitably tolled." 994 F.2d at 31. The *Oropallo* Court reasoned:

> [S]ection 6511(a) serves simply to identify which taxpayers have properly positioned themselves to obtain a refund. Like the 1-year period in *Lampf*, however, it does not describe which of those potential claimants will actually succeed in pursuing their rights. That task is left to section 6511(b)(2)(A), which, significantly, the tax code characterizes not as a limitations period, but as a "limit on [the] amount of credit or refund". . . . Unquestionably, then, th[e] date [mandated by § 6511 (b)(2)(A)] serves as an absolute cut-off point. By imposing an "outside limit" or "cut-off" on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the

> limitations period in *Lampf*, and thus is a "period of repose inconsistent with tolling."

Id. (quoting *Lampf*, 501 U.S. at 363). We find this rationale compelling.[8]

Therefore, even if *Irwin*'s general presumption as to equitable tolling is applicable in tax refund cases, § 6511(b)(2) serves as a separate and independent "time barrier[ ]" to recovery, *id.* at 30, a period of repose which itself, standing alone, is "inconsistent with tolling." *Lampf*, 501 U.S. at 363. Of course, the taxpayers here are correct that § 6511(b)(2) is different from the three-year provision at issue in *Lampf*. It is not as "pure" a statute of repose as that contained in § 9(e) of the Securities Exchange Act, but instead works together with § 6511(a) to operate like a statute of limitations. However, as the taxpayers themselves concede, § 6511(b)(2) also "defines the amount of" and "states a limit on" the recovery available in a tax refund suit. Brief for Appellants at 38. Indeed, Congress specifically captioned § 6511(b)(2) as a "[l]imit on [the] amount of credit or refund," as contrasted to § 6511(a) which is captioned as a "[p]eriod of limitation on filing [a refund] claim." Contrary to the taxpayers' assertions, the First Circuit in *Oropallo* recognized that the statutory scheme here is

---

[8]We disagree, however, with one of the analogies drawn by the First Circuit between § 6511(a) and the one-year period discussed in *Lampf*. Describing the Court's rationale in *Lampf*, the First Circuit observed that "once someone who has been defrauded knows the relevant facts, the 1-year period [under § 9(e)] gives that person ample time in which to sue and there is no need to toll the 1-year limitations period." 994 F.2d at 30. The First Circuit then concluded that:

> [a] similar state of knowledge respecting the right to a refund can be attributed to individual calendar year taxpayers who file income tax returns. The return contains all the information necessary to verify that there has been an overpayment of taxes and that a refund is due. Accordingly, the three-year period in section 6511(a) gives the taxpayer ample time to file a refund claim, and there is no need to toll that period.

Id. The facts of the case at hand belie this observation. They do not, however, undermine the essential holding in *Oropallo* that § 6511(b)(2), like the three-year period in *Lampf*, imposes an absolute cut-off, similar to a statute of repose, which is inconsistent with equitable tolling.

not identical to that in *Lampf* but nevertheless concluded, as we do, that § 6511(b)(2), like the three-year provision at issue in *Lampf*, is analogous to a statute of repose. As the First Circuit observed in *Oropallo*:

> Section 6511(b)(2)(A) works together with section 6511(a) and section 6513(b)(1) to bar recovery of any refund claims on late returns not filed with three years after the due date of the return, and thus it clearly operates like a statute of limitations. However, Congress's characterization of section 6511(b)(2)(A) as a "limit on [the] amount of credit or refund" rather than as a limitations period indicates more clearly than a simple limitations period would that Congress intended to establish an outside limit on the recovery of refunds.

994 F.2d at 30 n.7.

That § 6511(b)(2) is analogous to a statute of repose is significant given the well-recognized distinctions between statutes of limitations and statutes of repose. While the former is "a procedural device that operates as a defense to limit the remedy available from an existing cause of action," a statute of repose, in contrast, "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) (citations omitted), *cert. denied*, 493 U.S. 1070 (1990).

> Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims. Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

Id. (citations omitted); *see also Goad v. Celotex Corp.* 831 F.2d 508, 510-11 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

Thus, "as a general rule," while a statute of limitations is "tolled by a defendant's fraudulent concealment of a plaintiff's injury because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud," a statute of repose is typically "an *absolute* time limit beyond which liability no longer exists and is *not tolled for any reason* because to do so would upset the economic balance struck by the legislative body." *United States Gypsum Co.*, 882 F.2d at 866 (emphasis added) (citation omitted); *see generally* Christopher R. Leslie, "Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases," 81 Calif. L. Rev. 1587, 1591 (1993) ("a statute of repose is a type of statute of limitations which is not subject to equitable principles"). The Supreme Court's observations in *Lampf* with respect to the three-year period of repose contained in § 9(e) of the Securities Exchange Act are therefore equally applicable here:

> "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit." Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.

501 U.S. at 363 (quoting Bloomenthal, "The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude," 60 U. Colo. L. Rev. 235, 288 (1989)).

Moreover, we note that although the Internal Revenue Code contains certain carefully delineated exceptions to the limitations periods set forth in § 6511, *see, e.g.*, § 6511(c) (where time for assessment is extended by agreement); § 6511(d) (extending filing deadlines for certain classes of claims); §§ 1311-14 (providing mitigation from limitations periods for certain errors or adjustments in assessment), none of these exceptions pertain here. *See Evans Trust v. United States*, 462 F.2d 521, 524 (Ct. Cl. 1972) ("This relief [provided in §§ 1311-14] is limited to defined circumstances; the statute does not purport to permit the correction of all errors and inequities." (quoting *Gooding v. United States*, 326 F.2d 988, 990 (Ct. Cl.), *cert. denied*, 379 U.S. 834 (1964)) (citation and internal quotations omitted)). Significantly, when it became clear in *Dalm* that the taxpayer's action there did not come within the mitigation provisions contained in §§ 1311-14, the

Supreme Court concluded that were it "to allow [the taxpayer] to maintain a suit for refund on the basis of equitable recoupment," it would be "doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar." *Dalm*, 494 U.S. at 610. That same rationale holds true here.

Therefore, we conclude that even if *Irwin*'s general presumption of equitable tolling were applicable in tax refund cases, that presumption has effectively been rebutted by a statutory scheme that is inconsistent with equitable tolling. This conclusion is in accord with those courts that have determined that *Irwin*'s presumption as to equitable tolling has been rebutted in other contexts. *See, e.g., Central States Pension Fund v. Navco*, 3 F.3d 167, 173 (7th Cir. 1993) (§ 1451(f) of ERISA establishes a split limitations period similar to that discussed in *Lampf*), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1062 (1994); *Smith v. Secretary of H.H.S.*, 26 Cl. Ct. 116, 119 (Cl. Ct. 1992) (28-month limitations period for filing claims under National Childhood Vaccine Injury Act of 1986 serves as a "cut-off" similar to the statute of repose discussed in *Lampf*, and thus "equitable tolling does not apply"), *aff'd mem.*, 983 F.2d 1088 (Fed. Cir. 1992); *see also Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 670 (6th Cir. 1991) (30-day limitations period for filing discrimination claim under 5 U.S.C. § 7703(b)(2) which applies "[n]otwithstanding any other provision of law . . . . overrides any other provisions"), *vacated and remanded on other grounds*, 503 U.S. 902 (1992); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990) (3-year statute of repose in § 13 of Securities Act of 1933 constitutes an "outer limit" that precludes equitable tolling; "[u]nless the 'in no event more than three' language cuts off claims of tolling and estoppel at three years . . . it serves no purpose at all"), *cert. denied*, 501 U.S. 1250 (1991); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (statute of repose in Interstate Land Sales Full Disclosure Act is "absolute"); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1042-43 (10th Cir. 1980) (statute of repose "uses strong and unambiguous terms which, if not meant to create an absolute bar to untimely suits . . . are extraneous and meaningless").

IV.

In sum, we hold that there is no presumption of equitable tolling applicable in tax refund cases, but that even if such a presumption were applicable in suits for tax refunds, that presumption has been rebutted by a statutory scheme inconsistent with equitable tolling.[6] Accordingly, Parsons' refund claim was untimely, and the district court's dismissal of the complaint for lack of subject matter jurisdiction is

AFFIRMED.

RUSSELL, Circuit Judge, dissenting:

The circumstances in which this tax case arose are simply tragic. Mary Morton Parsons was a wealthy and elderly widow. After her close family died, she entrusted her personal and financial affairs to her physician and attorney, who cruelly abused and defrauded her. For years, they kept her drugged up and isolated her from friends and acquaintances. While she was thus incapacitated, they transferred substantial portions of her assets to themselves and their families. To

[6]We note that in any event the grounds for equitable relief here do not seem to rise to the level of those situations in which the Supreme Court in *Irwin* observed it had previously allowed equitable tolling, *i.e.*, "only sparingly . . . where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96 (footnote omitted). *See also Miller v. United States*, 949 F.2d 708, 712 (4th Cir. 1991) ("courts expressly have prohibited the application of the doctrine of equitable estoppel in cases involving the IRS"); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 201 (4th Cir. 1990) ("Equitable tolling is a narrow limitations exception . . . [and] applies only when an employer's reliance on the applicable statute of limitations would be inequitable, because the employer wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." (citation and internal quotations omitted)). There has been no assertion made here that Parsons filed a "defective pleading during the statutory period" or that the government's conduct in any way contributed to her failure to file her refund claim in a timely manner.

cover their tracks, they filed a gift tax return on Parsons' behalf and had Parsons pay gift taxes on the fraudulent transfers in the amount of $4,324,822.54.

If ever there were a tax case in which equitable tolling should apply, it is this one. Parsons was not a taxpayer who, because of her incapacity, simply neglected to claim a refund of overpaid taxes that the government rightfully collected or withheld from her. Instead, Parsons paid taxes she never would have paid had she not been rendered incompetent and defrauded by her physician and attorney. The government, although not a participant, was an unintentional beneficiary of the physician's and attorney's fraud. In denying the claim for refund filed on behalf of Parsons' estate, the government refuses to return the fraudulent proceeds wrongfully collected from Parsons.

The government can certainly afford to do the honorable thing in this case. To the government, which deals with budgets of trillions of dollars, four million dollars is just a drop in the bucket. Requiring the government to return the money improperly collected from Parsons would not impose any burden on it. Such an unbudgeted loss of revenues would destroy many corporations, but the government would hardly be affected.

I would apply equitable tolling in this case and require the government to refund to Parsons' estate the money wrongfully collected as gift taxes. Therefore, I respectfully dissent from the majority's opinion.

I.

The majority argues that the rebuttable presumption of equitable tolling announced in *Irwin* does not apply in tax refund cases. The Supreme Court held in *Irwin* that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Supra* at 13 (citing *United States v. Irwin*, 498 U.S. 89, 95-96 (1990)). The majority reasons that, because tax refund suits are always brought against the government and never against private defendants, the *Irwin* rule has no force in the tax refund context. *Supra* at 13.

I read the holding of *Irwin* more broadly. In *Irwin*, the Supreme Court announced a "general rule" that equitable tolling should apply in suits brought against the government. *Irwin*, 498 U.S. at 95. Before *Irwin*, some courts had held that equitable tolling of a statute of limitations could not apply in suits against the government because a statute of limitations was a condition of Congress' waiver of sovereign immunity, which must be construed narrowly. *See id.* at 93-94. *Irwin* made clear that equitable tolling did apply in actions against the government. The Supreme Court reasoned that, when Congress waives its sovereign immunity and allows plaintiffs to sue the government in a particular context, it implicitly authorizes equitable tolling of the applicable statute of limitations. *Id.* at 95.

When the Supreme Court stated its holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should apply to suits against the United States," *id.* at 95-96, it intended to ensure that equitable tolling applied equally against private defendants and the government. The Supreme Court was trying to remedy the unfairness of allowing equitable tolling only in suits against private defendants, but not in equivalent suits against the government. Certainly, the Supreme Court did not intend to allow equitable tolling to be applied more favorably in suits against the government than in suits against private defendants. If a statute or case law limited the application of equitable tolling in suits against private defendants, the Supreme Court intended for that limitation to apply also to suits against the government.

The Supreme Court did not consider how the *Irwin* rule should apply in a context like tax refund suits, where all suits are brought against the government and none against private defendants. The general thrust of the *Irwin* holding, however, was to expand the application of equitable tolling to suits brought against the government. The Supreme Court did not intend for equitable tolling to be categorically denied in actions that can be brought only against the government.

Mental incompetency is one of the fundamental equitable reasons for tolling a statute of limitations.* *Lopez v. Citibank, N.A.*, 808 F.2d

*Although there is a line of cases holding that mental incompetence does not toll a statute of limitations, *e.g.*, *Harris v. Ford Motor Co.*, 635

905, 906-07 (1st Cir. 1987) (holding that there is no absolute rule requiring equitable tolling whenever there is mental incompetency, but that tolling may apply on a case-by-case basis); *Char v. Matson Terminals Inc.*, 817 F. Supp. 850, 855 (D. Haw. 1992) (following *Lopez*). Indeed, courts have tolled the limitations periods for filing tax refund claims on grounds of the taxpayer's mental incompetence. *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992); *Scott v. United States*, 795 F. Supp. 1028, 1035 (D. Haw. 1992); *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991). Although courts will not equitably toll the applicable statute of limitations where a mentally incompetent person was represented by counsel, *Lopez*, 808 F.2d at 907; *Char*, 817 F. Supp. at 855-56, that restriction on equitable tolling certainly cannot apply in this case. Parsons was rendered incompetent *by* her attorney and physician, who kept her heavily sedated and isolated from friends and acquaintances for many years. Given these extreme circumstances, I would toll the limitation periods in § 6511 and allow Parsons' estate to file a claim for refund of the wrongfully paid taxes.

II.

As a backup argument, the majority argues that the presumption of equitable tolling has effectively been rebutted in the context of tax refund suits. Following the lead of the First Circuit in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 705 (1994), the majority finds the structure of the limitations periods in § 6511 inconsistent with equitable tolling. The majority finds "compelling" the following reasoning of the *Oropallo* court:

> [S]ection 6511(a) serves simply to identify which taxpayers have properly positioned themselves to obtain a refund. . . . [H]owever, it does not describe which of those potential claimants will actually succeed in pursuing their rights. That task is left to section 6511(b)(2)(A), which, significantly,

F. Supp. 1472, 1473-74 (E.D. Mo. 1986) (citing cases), most of those cases involved claims against the federal government and were decided on sovereign immunity grounds. *Lopez v. Citibank, N.A.*, 808 F.2d 905, 906-07 (1st Cir. 1987); *Char v. Matson Terminals Inc.*, 817 F. Supp. 850, 855 (D. Haw. 1992).

> the tax code characterizes not as a limitations period, but as a "limit on [the] amount of credit or refund" . . . . Unquestionably, then, th[e] date [mandated by § 6511(b)(2)(A)] serves as an absolute cut-off point.

Supra at 16 (quoting *Oropallo*, 994 F.2d at 31). The majority concedes that § 6511(b)(2) is not a pure statute of repose but "instead works together with 6511(a) to operate like a statute of limitations." *Supra* at 17. Nonetheless, the majority finds that the tax code's caption of § 6511(b)(2) as a "[l]imit on [the] amount of credit or refund" demonstrates Congress' intent to establish an outside limit on the recovery of funds in tax refund suits. *Id.* The majority therefore concludes that § 6511(b)(2) operates akin to a statute of repose, which is inconsistent with equitable tolling. *Id.*

I read § 6511(b)(2) simply as a statute of limitations. As the majority recognizes, the limitations periods in § 6511(b)(2) operates together with § 6511(a) as a statute of limitations. In fact, § 6511(a) is the more benign of the two limitations periods. Section 6511(a) merely requires the taxpayer to file his claim for refund either within three years of the filing of the tax return or within two years of the payment the taxes. The taxpayer can easily satisfy this requirement at any time by remembering to file a tax return before filing the claim for refund. Section 6511(b)(2) imposes the more significant limitation on the filing of claims for refund. It requires the taxpayer to file his claim for refund within either two or three years from the date on which the taxes were paid. The taxpayer receives the three-year limitations period as long as he has filed a tax return within the three years preceding the filing of the claim for refund. Otherwise, the taxpayer receives only the two-year limitation period. In effect, § 6511(b)(2) is the real statute of limitations; it identifies which taxpayers have properly positioned themselves to obtain a refund. Section 6511(a) merely determines whether the taxpayer receives the two-year or three-year limitations period under § 6511(b)(2).

The caption to § 6511(b)(2) does not magically turn that section into an absolute cut-off of refund claims. Whatever the caption, § 6511(b)(2) is simply a statute of limitations, requiring the taxpayer to file his claim for refund within either two or three years of the payment of taxes. Nothing about the structure of § 6511 or the phrasing

of the caption to § 6511(b)(2) suggests that Congress intended § 6511(b)(2) to serve as an absolute cut-off of refund claims. Like any statute of limitations, § 6511(b)(2) can be equitably tolled in appropriate circumstances.

The statutory scheme in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), presents a different situation. The *Lampf* case dealt with the following statute of limitations applicable to securities fraud suits under § 10(b) of the Securities Exchange Act of 1934: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf*, 501 U.S. at 358-61 and n.6 (citing 15 U.S.C. § 78i(e)). In this statutory scheme, the three-year limitation acts as a statute of repose. The plaintiff must sue within three years of the occurrence of the securities violation, regardless of whether the plaintiff knew during that three-year period that the violation had occurred. The three-year period operates as an absolute cut-off, and there is no room for a court to expand the limitations period, no matter how equitable the grounds. Thus, a plaintiff who knows about a securities fraud violation but waits more than a year to sue is barred from suing because of his own delinquency, but even the most conscientious plaintiff is barred from filing suit if he discovers the fraud more than three years after its occurrence.

The majority's comparison of § 6511(b)(2) to the limitations period in *Lampf* is unavailing. The three-year limitations period in *Lampf* could operate only as a statute of repose. In light of the one-year limitations period for those who discover a securities fraud violation, Congress must have intended the three-year period to serve as an absolute cut-off of claims. The limitations period in § 6511(b)(2) simply requires a taxpayer to file his claim for refund within two or three years of the payment of taxes. Nothing about § 6511(a) suggests that Congress intended § 6511(b)(2) to operate as an absolute cut-off of refund claims. Therefore, I disagree with the majority's conclusion that the presumption of equitable tolling has been rebutted in the context of tax refund suits.

III.

For the foregoing reasons, I respectfully dissent from the opinion of the majority. I would apply the doctrine of equitable tolling and allow Parsons' estate to collect a refund of her wrongfully paid taxes.

Clinton WEBB, et al., Plaintiffs,

v.

UNITED STATES of America, Defendant.

Civ. A. No. 3:93CV847.

United States District Court,
E.D. Virginia,
Richmond Division.

May 4, 1994.

John Codd Irvins [sic], Jr., Brian Keith Jackson, Everette G. Allen, Jr., Charles Frederick Witthoefft, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, VA, for plaintiffs.

Debra J. Prillaman, Asst. U.S. Atty., Richmond, VA, and Gerard Mene, Dept. of Justice, Tax Div., Washington, DC, for defendant.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, Senior District Judge.

This matter is before the Court on defendant's motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction

and for failure to state a claim on which relief can be granted. For the reasons set forth below, the Court grants the motion pursuant to Fed.R.Civ.P. 12(b)(1).

I. *Facts*

On April 5, 1988, Mary Morton Parsons, who is deceased, filed a refund claim with the Internal Revenue Service ("IRS") for $10,862,876.88 plus interest.[1/] In the refund claim, Parsons sought a refund of gift taxes paid with a gift tax return for the third quarter of 1980. Generally, Parsons' claim alleged that the various gifts of stock reported on the return were not gifts or were void gifts because she had been defrauded by her two financial advisors in making the transfers.

With respect to Parsons' claim, plaintiffs make the following specific contentions, which the Court treats as true for purposes of this motion: By virtue of Parsons' advanced age, trusting nature, emotional vulnerability, declining health and drug dependence, she became a victim of the fraud and undue influence and control of her doctor, Alvin Q. Jarrett, and her lawyer, B. Roland Freasier, Jr. As Parsons' fiduciaries, Jarrett and Freasier took over her personal and business affairs so totally that they were able to transfer to themselves substantially all of her stock holdings in 1980. Thereafter, and during the relevant

---

[1/] The plaintiffs in this case, Clinton Webb and NationsBank of Virginia, N.A., f/k/a Sovran Bank, N.A. ("NationsBank"), are the coexecutors of Parsons' estate and have filed suit on behalf of the estate.

period of 1980 to July 1987, Jarrett and Freasier limited Parsons' contact with friends, and Jarrett regularly administered pain-killing drugs, sleeping pills, and tranquilizers. Parsons was confined to her bed in Virginia Beach and given inadequate medical care while her household staff was cut back and her contacts with the outside world were limited still further. Parsons was totally dependent on Jarrett to manage all of her physical, emotional, and financial needs, and she was neither aware of, nor able to inform herself about, the fraud and self-dealing of her fiduciaries.

The United States refunded to Parsons $7,038,054.34 plus interest. It refused to refund any further amounts paid by Parsons on the basis of a statute of limitations bar. Plaintiffs have instituted this suit for the disallowed portion of the refund claim.

II. *Analysis*

A. A CLAIM FOR REFUND MUST BE FILED WITHIN THREE YEARS OF THE DATE OF THE RETURN

A timely claim for refund is a jurisdictional prerequisite to the filing of a tax refund suit. *See* 26 U.S.C. § 7422(a) (Internal Revenue Code of 1986, as amended).[2/] This jurisdictional prerequisite is not

---

[2/] This section provides:

(continued...)

waivable by the government. *See Miller v. United States*, 949 F.2d 708, 712 (4th Cir. 1991). A taxpayer must file a claim for refund with the IRS within three years of the date the return is filed or within two years of the date the tax is paid, whichever is later. 26 U.S.C. § 6511(a).

In this case, the return was filed in August 1980, and the refund claim was filed almost eight years later, on April 8, 1988. Therefore, because plaintiffs filed the refund claim more than three years after the return was filed, the claim was not timely.

Where a refund claim is not timely filed, there is a limitation on the amount of any refund. Specifically, 26 U.S.C. § 6511(b)(2)(B) provides that "[i]f the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of

---

[2/](...continued)

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

the tax paid during the 2 years immediately preceding the filing of the claim." In this case, Parsons paid $7,038,054.34 within the two-year period preceding the refund claim. The United States has refunded this amount plus interest, for a total of $9,844,541.03. Therefore, because the refund cannot exceed this amount, plaintiffs are entitled to recover no more.

B. EQUITABLE TOLLING IS INAPPLICABLE IN TAX REFUND SUITS

The essence of the parties' dispute concerns the issue of the applicability of equitable tolling to this case. The United States makes a two-part argument: (1) that equitable tolling does not apply in tax refund suits and (2) that, assuming it does, equitable tolling does not apply on these facts. The plaintiffs dispute both contentions.

1. *Applicability to Tax Refund Suits*

Plaintiffs rely on *Irwin v. Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), which they claim changed the law on the application of equitable tolling to tax cases. According to plaintiffs, *Irwin* modified the reasoning of many courts, which refused to apply general principles of equity to toll the statute of limitations in tax refund cases on the rationale that the waiver of sovereign immunity and the terms of such waiver should be strictly construed and that a limitations period that was jurisdictional in nature could not be tolled.

In *Irwin*, the plaintiff filed a complaint with the Veteran's Administration alleging that he had been unlawfully terminated on the basis of race and physical disability. The complaint was dismissed by the Administration. In the EEOC's letter affirming the decision, plaintiff was notified of his right to file a civil action within 30 days of receipt of the notice under 42 U.S.C. § 2000e. Plaintiff, however, filed the complaint 44 days after the notice was received at his attorney's office. Therefore, the complaint was dismissed. Plaintiff objected, contending that he had not received the letter until 19 days after the letter was sent and that his attorney, who had also been sent a copy of the letter, was out of the country when the letter arrived.

The Supreme Court granted certiorari "to determine when the 30-day period under § 2000e-16(c) begins to run and to resolve the Circuit conflict over whether late-filed claims under [§ 2000e-16(c)] are jurisdictionally barred." 498 U.S. at 92, 111 S.Ct. at 455. The Court found the complaint untimely, but considered plaintiff's alternative argument that his error could be excused under equitable tolling principles. The court of appeals had rejected plaintiff's argument on the ground that the filing period contained in § 2000e-16(c) is jurisdictional and therefore the district court lacked authority to consider plaintiff's equitable claims. 498 U.S. at 93. The court reasoned that § 2000e-16(c) applied to suits against the federal government and thus was a condition of Congress' waiver of sovereign immunity. *Id.* at 93-94, 111 S.Ct. at 456-57. Since waivers of sovereign immunity are traditionally construed narrowly, the

court determined that strict compliance with § 2000e-16(c) was a necessary predicate to a Title VII suit.

The Supreme Court held, however, that the same rebuttable presumption of equitable tolling applicable to suits against private defendants is applicable to suits against the United States. 498 U.S. at 95-96, 111 S.Ct. at 457-58. But the Court refused to apply equitable tolling to benefit the plaintiff holding that equitable tolling did not apply because the late-filed suit involved "a garden variety claim of excusable neglect." *Id.* at 96, 111 S.Ct. at 458.

Plaintiffs in this case rely on post-*Irwin* cases that have held that equitable tolling applies to tax refund cases. They argue that *Scott v. United States*, 795 F.Supp. 1028 (D.Haw.1992) is instructive. In that case, a tax refund suit was filed following the denial by the IRS of the taxpayer's refund claim on the ground that it was untimely under the limitations period set forth in 26 U.S.C. § 6511. Both sides agreed that the claim was not timely filed, but the taxpayer contended that he was rendered mentally incompetent because of severe, long-term alcoholism and that this condition warranted application of the equitable tolling doctrine. 795 F.Supp. at 1030. As in the present case, the government filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction. The district court denied the government's motion, holding that:

> The government contends that statutes of limitations covering suits against the United States are prerequisites to federal

> court jurisdiction. [citation omitted]. While this contention is true as a general proposition, the Supreme Court has recognized exceptions to strict application of time-bar rules. In support of its motion to dismiss, the government cites numerous cases all of which pre-date the Supreme Court's recent decision in *Irwin*. ... The *Irwin* Court recognized that the statute of limitations may be equitably tolled even where the statute of limitations is a prerequisite to federal court jurisdiction, rendering the cases cited by the government inapplicable.

795 F.Supp. at 1031. Noting that *Irwin* involved an untimely Title VII claim, the district court in *Scott*, nevertheless, found that "the reasoning in that decision applies with equal force to untimely tax claims." *Id.* *See also Wiltgen v. United States*, 813 F.Supp. 1387 (N.D.Iowa 1992) and *Johnsen v. United States*, 758 F.Supp. 834 (E.D.N.Y. 1991) (both holding, based on *Irwin*, that § 6511 can be equitably tolled). Therefore, based on the presumption established by *Irwin* in favor of the applicability of the principle of equitable tolling, plaintiffs contend that the government has the burden of demonstrating a clear congressional intent that the limitations period set forth in § 6511 may not be equitably tolled and that it has made no such showing.

The Court, however, finds *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), a tax case, more instructive than *Irwin*. In *Dalm*, when

the taxpayer's claim for refund of a gift tax she had paid was denied on statute of limitations grounds under § 6511, the taxpayer sued, alleging that she stated a cause of action for equitable recoupment.[3/]

In assessing plaintiff's claim, the Court was faced with the statute of limitations period under § 6511, which barred plaintiff's refund. The Court stated:

> Read together, the import of these sections [§§ 7422 and 6511] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' . . . may not be maintained in any court.

494 U.S. at 602, 110 S.Ct. at 1365 (citation omitted). The Court went on to state that permitting equitable considerations to encroach upon statutorily prescribed deadlines for the maintenance of tax refund actions

---

[3/] Equitable recoupment is premised on the notion that a taxpayer can recover where the government has taxed a single transaction or event under two inconsistent theories. Though *Dalm* involved the doctrine of equitable recoupment rather than equitable tolling, the Court finds the case persuasive. *See Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991)(applying *Dalm*, post-*Irwin*, to bar plaintiffs' late-filed claim for refund and to reject plaintiffs' assertion of the equitable tolling doctrine).

"would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar." *Id.* at 610, 110 S.Ct. at 1369.

In response to the taxpayer's equitable argument that the statute of limitations should begin when the taxpayer discovers the payment is erroneous, the Court stated:

> The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.

Id. at 609-10 n. 7, 110 S.Ct. at 1369 n. 7. Therefore, it is well-settled that equity principles have no application in tax cases. As the government points out, tax statutes of limitations, unlike those that are applicable to torts and other actionable matters, operate in both directions in that the government is given a limited period of time in which to make

assessments, and taxpayers are given a limited period of time to seek refunds. As the court stated in *Blatt v. United States*, 830 F.Supp. 882 (W.D.N.C. 1993), in relying on *Dalm* to deny relief based on equitable recoupment to a taxpayer whose refund was barred by § 6511, "[t]ax cases do not lend themselves to an equitable solution. The Tax Code and regulations are technical and must be interpreted accordingly.... To hold otherwise would seriously undermine the administration of the tax laws." *Id.* at 888. The Court finds this reasoning convincing and rejects the decisions of the three district courts that have held, based on *Irwin*, that equitable tolling applies to tax cases.

2. *Applicability of Equitable Tolling to this Case*

The district court cases on which plaintiffs rely have held that equitable tolling may operate to toll the statute of limitations period under § 6511 where there is mental incompetency. *See Scott v. United States*, 795 F.Supp. 1028, 1035 (D.Haw.1992), *Wiltgen v. United States*,813 F.Supp. 1387, 1394-95 (N.D.Iowa 1992), *Johnson v. United States*, 758 F.Supp. 834, 836. The Court finds that plaintiffs set forth in their complaint facts that would establish a cognizable legal disability in that they establish that Parsons was incapable of handling or managing her legal affairs while under Jarrett's and Freasier's influence and control. Accordingly, the Court finds that plaintiffs would have established the applicability of equitable tolling to this case under the cases on which they rely. *See also Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 596

(9th Cir. 1991)("Courts have held that when external forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim, equitable tolling is proper.") Nevertheless, because the Court finds that the law does not recognize equitable tolling in a tax case, the plaintiffs cannot recover.

III. *Conclusion*

For the foregoing reasons, the defendant's motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction is granted.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 28, 1995

No. 94-1854
CA-93-847

CLINTON WEBB; NATIONSBANK OF VIRGINIA, N.A., formerly known as Sovran Bank, N.A., Co-executors of The Estate of Mary Morton Parsons, Deceased

Plaintiffs - Appellarts

v.

UNITED STATES OF AMERICA

Defendant - Appellee

- - - - - - - - - - - -

On Petition for Rehearing with Suggestion for Rehearing In Banc

- - - - - - - - - - - -

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing are denied.

For the Court,

/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
1996

(2)

No. 95-1360

In the Supreme Court of the United States

OCTOBER TERM, 1995

CLINTON WEBB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

10PP

QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of income taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of allowable recovery on a claim (26 U.S.C. 6511(b)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Discussion	5
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Brockamp v. *United States*, 67 F.3d 260 (9th Cir. 1995)	5
Bull v. *United States*, 295 U.S. 247 (1935)	3
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	3-4
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991)	4
Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994)	4, 5
Vintilla v. *United States*, 931 F.2d 444 (11th Cir. 1991)	5

Statutes:

Internal Revenue Code (26 U.S.C.):	
§ 6511	2
§ 6511(a)	2, 3, 4
§ 6511(b)	2, 3, 4
§ 6511(b)(2)(B)	2
§ 7422	2

Miscellaneous:

BNA Daily Tax Report G-8 (March 21, 1996)	5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1360

CLINTON WEBB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 66 F.3d 691. The opinion of the district court (Pet. App. 27a-38a) is reported at 850 F. Supp. 489.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1995. The petition for rehearing with suggestion for rehearing *en banc* was denied on November 28, 1995. The petition for a writ of certiorari was filed on February 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. 6511, 7422, are set forth at Pet. 2-4.

STATEMENT

1. Petitioners are the executors of the estate of Mary Morton Parsons (Parsons), who died on August 26, 1990. Parsons was a wealthy widow who was victimized by her physician, Dr. Alvin Q. Jarrett, and her attorney, B. Roland Freasier. Under their influence, she made gifts of stock to trusts established for Jarrett and Freasier in 1980. She filed a gift tax return in 1980, paying a tax of $4,324,822 on these gifts. On audit by the Internal Revenue Service, Parsons made additional gift tax payments in 1986 and 1987 that exceeded $7,000,000 (Pet. App. 2a-3a).

Later in 1987, Parsons discovered that she had been defrauded by Jarrett and Freasier. She retained counsel to recover the assets that had been the subject of the gifts and also filed a refund claim to recover the gift taxes that had been paid (Pet. App. 3a). Acting pursuant to 26 U.S.C. 6511(b)(2)(B), the Internal Revenue Service refunded only the taxes paid within the two year period preceding the refund claim. The amount refunded, including interest, amounted to $9,844,541. The remainder of the refund claim—seeking recovery of the $4,324,822 payment made in 1980—was denied because the claim was filed more than three years after the gift tax return was filed and more than two years after the tax was paid, and was therefore untimely under 26 U.S.C. 6511(a) and barred by 26 U.S.C. 6511(b) (Pet. App. 2a-4a).

2. After Parsons's death, petitioners brought this refund suit in federal district court. The court agreed with the Commissioner that petitioners' re-

fund claim was untimely under 26 U.S.C. 6511(a) and was barred by 26 U.S.C. 6511(b) and therefore dismissed the case for lack of subject matter jurisdiction (Pet. App. 27a-38a).

The court noted that Parsons's refund claim was filed eight years after the tax was paid and the tax return was filed, and was therefore untimely under 26 U.S.C. 6511(a). The court further noted that, under 26 U.S.C. 6511(b), recovery on a refund claim is limited to the amount of tax paid (i) in the three years preceding the filing of the claim if the claim is filed within three years after the filing of the return, or (ii) within two years of the filing of the claim if the claim is not filed within three years after the filing of the return (or if no return was filed) . As the result, petitioners' recovery would be barred under 26 U.S.C. 6511(b) even if it were not untimely under 26 U.S.C. 6511(a).

3. The court of appeals affirmed (Pet. App. 1a-26a). The court rejected petitioners' contention that the doctrine of equitable tolling permits recovery of a tax refund claim that is untimely under 26 U.S.C. 6511(a) and barred under 26 U.S.C. 6511(b). The court stated that the decision of this Court in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), made a rebuttable presumption of equitable tolling applicable to suits against the government only when such tolling principles are applicable in similar suits involving private parties. The court noted that, in *Irwin*, this Court sought to achieve "[e]qual treatment of private and government defendants" by ensuring that equitable tolling applies to suits against the government "*in the same way that it is applicable to private suits*" (Pet. App. 10a-11a), quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95

(emphasis added by court of appeals)). The court of appeals concluded that, when equitable tolling applies in a case brought against a private litigant, equitable tolling is also presumptively applicable in a comparable case against the United States. The court explained that, "[u]nlike tort actions or employment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants" (Pet. App. 12a). Noting that taxes "are the life-blood of government" (*ibid.*, quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)), the court concluded that an assumption that equitable tolling applies under Section 6511(a) and (b) would not be based on a realistic assessment of legislative intent. The court therefore held that "*Irwin*'s rebuttable presumption of equitable tolling is not applicable in tax refund suits" (Pet. App. 14a).

The court further held that, "[e]ven if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail here" (Pet. App. 14a). The court agreed with the analysis of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S.Ct. 705 (1994), that the combined limitations of Section 6511(a) and (b) are "inconsistent with equitable tolling" (Pet. App. 16a). The court noted that the substantive limitations on recovery contained in Section 6511(b) serve as a "separate and independent 'time barrier[]' to recovery, * * * a period of repose which itself, standing alone, is 'inconsistent with tolling'" (Pet. App. 17a, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), and *Oropallo* v. *United States*, 994 F.2d at 30).

DISCUSSION

Petitioners correctly note (Pet. 13-26) that the decision of the Ninth Circuit in *Brockamp* v. *United States*, 67 F.3d 260 (1995), petition for cert. pending, No. 95-1225, conflicts with the decision of the Fourth Circuit in this case and also conflicts with the decision of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), and of the Eleventh Circuit in *Vintilla* v. *United States*, 931 F.2d 1444 (1991). Petitioner is also correct that the question presented in the petition for a writ of certiorari in *Brockamp* is a recurring question of substantial administrative importance. See 95-1225 Pet. 20. The question is presented in *Brockamp* in factual settings that are more typical than the unusual circumstances of this case.

Because disposition of the question presented in *Brockamp* will also dispose of the question presented in this case, the petition for a writ of certiorari in this case should be held pending the disposition of *United States* v. *Brockamp*, No. 95-1225.[1]

---

[1] Legislative proposals currently under consideration may prospectively resolve the question presented in this case. See BNA Daily Tax Report G-8 (March 21, 1996).

CONCLUSION

The petition for a writ of certiorari should be held pending the final disposition of *United States* v. *Brockamp*, No. 95-1225, and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996

(3)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1360

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CLINTON WEBB AND NATIONSBANK OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS, DECEASED, PETITIONERS,

V.

THE UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Charles F. Witthoefft, Counsel of Record
Everette G. Allen, Jr.
John C. Ivins, Jr.
HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, P.C.
The Federal Reserve Bank Building
701 East Byrd Street
Post Office Box 500
Richmond, Virginia 23218-0500
(804) 771-9500

Attorneys for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

9 pp

QUESTION PRESENTED FOR REVIEW

Whether the doctrine of equitable tolling, presumed to apply to claims against the government as expressed in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is applicable to toll the limitations period for tax refund claims under 26 U.S.C. §§ 6511 (a) and (b).

TABLE OF CONTENTS

Page

Table of Authorities ii
Introduction 1
Discussion 2
Conclusion 5

TABLE OF AUTHORITIES

Cases:

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) . . . . . i, 3

United States v. Brockamp, 67 F.3d 260 (9th Cir. 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996) 2-5

United States v. Scott, Nos. 94-15321, 15323 (9th Cir. Oct. 5, 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996) 3-5

Statutes:

26 U.S.C. § 6511 i

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NO. 95-1360

CLINTON WEBB AND NATIONSBANK OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS,DECEASED, PETITIONERS,

V.

THE UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Petitioners are cognizant of the restriction of Rule 15.6 of the Rules of the Supreme Court that this Reply should address only new matters raised by the Government's brief. Hence, while Petitioners do not concur with the Government's summary of the proceedings, certain aspects of its discussion of the

relevant cases, and its characterization of the Petitioners' Petition for Writ of Certiorari, they merely note such objections here and incorporate their own Petition in response thereto.

DISCUSSION

The Government does not argue in its Brief for the United States that the Petitioners' Petition for Writ of Certiorari should be denied.[1/] Rather, the Government asserts that the Court should grant the Government's Petition for Writ of Certiorari filed in *United States v. Brockamp*, 67 F.3d 260 (9th Cir. 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996), and that the Petition for Writ of Certiorari in this case should be held pending the Court's disposition of *Brockamp*.[2/] The Government's proposal, however,

---

[1/] In fact, the Government acknowledges, as it must, that the legal issue in this case is the same as in the *Brockamp* and *Scott* cases in which the Government has filed its own Petition for Writ of Certiorari.

[2/] The Government also references certain legislative proposals as being "under consideration." *See* Brief of the United States at 5, n. 1. However, any such uncertain legislative initiative should have (continued...)

overlooks important considerations which favor the granting of the Petition for Writ of Certiorari in this case.

Petitioners and the Government agree that the decision of the Fourth Circuit in this case directly conflicts with the decision of the Ninth Circuit in *Brockamp*. Although the question presented here involves the same issue of law set forth in *Brockamp*, this case concerns a significantly greater sum that was wrongfully withheld by the Internal Revenue Service than the tax refund claims disputed in *Brockamp* and in its companion case, *United States v. Scott*, Nos. 94-15321, 15323 (9th Cir. Oct. 5, 1995), *petition for cert. filed*, No. 95-1225 (Jan. 31, 1996). In addition, as stated more fully in the Petitioners' Petition at pages 20 through 23, the reasoning employed by the Fourth Circuit in reaching its decision in this case rests on an unprecedented reading of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and should be addressed directly by the Court in this case.

2/ (...continued)
no impact upon this Court's consideration of the Government's or Petitioners' certiorari petitions.

Moreover, in light of the directly conflicting decisions of the Fourth and Ninth Circuits -- one in favor of the Government and one in favor of the taxpayers -- holding this case for decision pending the disposition of *Brockamp,* as the Government suggests, is judicially inefficient. The interests of justice would be better served by granting the Petition for Writ of Certiorari in this case as well as the petition in the *Brockamp* and *Scott* cases and consolidating the cases. The issuance of divergent opinions by the Fourth and Ninth Circuits within three days of each other presents the Court with an unusual opportunity to fully address the discrete issue of law presented by these cases with the benefit of full legal argument from the different perspectives represented. Similarly, the differing fact patterns presented in this case, *Brockamp*, and *Scott* create a broader spectrum of circumstances from which the Court can comprehensively consider the legal issue common to these cases. Complete, collaborative efforts of all counsel will assist the Court by ensuring full and effective development of the question presented for review.

Given the substantive and administrative importance to the tax laws of the equitable principle presented by this case, as well as by *Brockamp* and *Scott*, it is appropriate that the Court grant both Petitions for Writ of Certiorari and consolidate the cases for further consideration. Should the Court choose not to consolidate the cases, however, it should not yield to the Government's suggestion that *Brockamp* is a more appropriate vehicle for resolution of the common question presented. Rather, the Petition for Writ of Certiorari in this case, involving a significant refund claim disposed of by the Fourth Circuit through an unprecedented interpretation of *Irwin*, should be granted.

CONCLUSION

Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari. In addition, Petitioners also request that if the Petition for Writ of Certiorari in *United States v. Brockamp* and *United States v. Scott*, No. 95-1225, is also granted, the cases be consolidated for purposes of further argument and disposition.

CLINTON WEBB AND NATIONSBANK, OF VIRGINIA, N.A., F/K/A SOVRAN BANK, N.A., CO-EXECUTORS OF THE ESTATE OF MARY MORTON PARSONS, DECEASED

Charles F. Witthoefft, Counsel of Record
Everette G. Allen, Jr.
John C. Ivins, Jr.
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN, P.C.
The Federal Reserve Bank Building
701 East Byrd Street
Post Office Box 500
Richmond, VA 23218-0500
(804) 771-9500

Counsel for Petitioners